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In the Supreme Court of the United States

October Term, [redacted] 1970
No. 329

RALPH LOUIS ZARRA,
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Ralph Louis Zarra, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on April 29, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the United States of the Middle District of Pennsylvania is reported at 298 F. Supp. 1074 (M.D. Pa. 1969), and is printed in the Appendix hereto, pages 30-56. The opinion of the Court of Appeals is printed in the Appendix hereto, pages 57-58.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on April 29, 1970, under date of May 26, 1970, this Honorable Court granted an extension of time within which to petition for certiorari to June 28, 1970. On June 5, 1970, the Third Circuit Court of Appeals denied your Petitioner's motion for leave to file a petition for rehearing out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the failure of an indictment charging the aiding and abetting of a bank embezzlement to allege the necessary elements of unlawful or fraudulent intent or wilfulness renders the conviction infirm?

2. Whether a jury charge that the "witness Frederick Hesse, Sr. was an accomplice of the accused in the case" was erroneous and prejudicial to the Petitioner since it carried with it an implication that the Defendant's guilt had been determined?

STATEMENT OF THE CASE

Petitioner was tried and convicted by a jury of violating Title 18, United States Code, Sections 656 and 2. While the indictment (App. 12) is not clear on the specific charges against the appellant; it is believed that the Government intended to charge Ralph Louis Zarra with aiding and abetting Frederick DeLancey Hesse in the embezzlement of funds at the Hershey National Bank, Hershey, Pennsylvania. A complaint had been filed against the Petitioner charging him with violation of 18 U.S.C. 656, 2 on January 20, 1966. A motion to dismiss the indictment under Rule 12 of the Federal Rules of Criminal Procedure was denied and on March 1, 2, and 6, 1967, trial was held before the Honorable Michael H. Sheridan, Chief United States District Judge for the Middle District of Pennsylvania. At the conclusion of the trial, the Defendant was adjudged guilty.

On March 15, 1967, Petitioner filed motions for judgment of acquittal notwithstanding the verdict and in the alternative for a new trial and a Motion in Arrest of Judgment. Motions were denied (App. 30) on March 31, 1969.

On April 29, 1970, the Third Circuit Court of Appeals upheld the District Court's decision (App. 37). On May 20, 1970, Petitioner moved for leave to file a petition for rehearing out of time which was denied on June 5, 1970. In the interim, Petitioner was granted an extension of time to file a Petition for Writ of Certiorari by your Honorable Court.

REASONS FOR GRANTING THE WRIT

1. The law requires that an indictment to state all the essential elements of the crime of which the defendant has been charged. See, e.g., *Smith v. United States*, 360 U.S. 1 (1959); *United States v. Thompson*, 356 F. 2d 216 (2nd Cir. 1965); *Walker v. United States*, 342 F. 2d 22 (5th Cir. 1965).

Where unlawful or fraudulent intent and wilfulness are essential elements of the crime, the indictment must allege these elements or the conviction is a nullity. See, e.g., *Honea v. United States*, 344 F. 2d 798 (5th Cir. 1965); *Hughes v. United States*, 338 F. 2d 651 (1st Cir. 1964), reh. denied 340 F. 2d 609; *United States v. Blackshere*, 282 F. Supp. 846 (N.N.M. 1968) (involving 18 U.S.C. §2).

The Third Circuit Court of Appeals in the case of *United States v. Beard*, 414 F. 2d 1014, (3rd Cir. 1969), followed the general law discussed above and dismissed indictments which failed to allege the essential element of "unlawful or fraudulent intent." The Court of Appeals in the *Beard* decision cited the holdings of *Smith v. United States*, 360 U.S. 1 (1959); *United States v. Britton*, 107 U.S. 655 (1882); *Rosen v. United States*, 161 U.S. 29 (1896); *Russell v. United States*, 369 U.S. 749 (1962); *Stirone v. United States*, 361 U.S. 212 (1960).

In your Petitioner's case, the Third Circuit Court of Appeals completely ignored these holdings and held that an indictment which failed to allege unlawful or fraudu-

lent intent or wilfulness was sufficient. While the Court failed to explain its decision not to follow the holdings of Your Honorable Court as it had done in the *Heard* decision, the distinction relied upon appears to be that the elements of unlawful or fraudulent intent and wilfulness are not prescribed in the statutes allegedly violated by your Petitioner.

The distinction is meaningless, however, since the elements of wilfulness, guilty knowledge and unlawful or fraudulent intent are essential elements not only of the embezzlement, but also of the aiding and abetting even though they are not specifically mentioned in the statute. *United States v. Mullens*, 355 F. 2d 883 (7th Cir. 1966), cert denied, 384 U.S. 1942 (1966); *Williamson v. United States*, 332 F. 2d 123 (5th Cir. 1964); *Goldein v. United States*, 318 F. 2d 337 (1st Cir. 1963). The mere fact that the statute, 18 U.S.C. 656 and 2, does not use the words "intent to defraud" does not mean that a grand jury does not have to make a finding on the existence of that element.

An indictment in the language of the statute ordinarily is sufficient, but where the words of the statute do not contain all of the elements of the offense, the indictment must supply it with certainty. *Honea v. United States*, 344 F. 2d 798 (5th Cir. 1965); *Babb v. United States*, 218 F. 2d at 338 (5th Cir. 1955).

The mere use of the terms, aid, abet and counsel, command, induce or procure are insufficient unless used in connection with specific allegations as to willfulness, knowledge and intent. See *United States v. Mullens*, 355 F. 2d 883 (7th Cir. 1966), cert. denied, 384 U.S. 1942

(1966); *United States v. Barns*, 213 F. Supp. 510 (E.D. Pa. 1963). It cannot be argued that "intent to defraud" was implied in the indictment and since essential elements of the crime cannot be implied in any indictment. See *United States v. Thompson*, 356 F. 2d 216 (2nd Cir. 1965); *Walker v. United States*, 243 F. 2d 22 (5th Cir. 1965).

In the Petitioner's case, the Grand Jury made no finding of probable cause that unlawful intent, an essential element, existed. This violates the mandate established in *Russell v. United States*, 369 U.S. 749 (1962), and *Smith v. United States*, 360 U.S. 1 (1959).

As was stated in *Russell v. United States*, 369 U.S. 770 (1962) to allow the prosecutor, or the court, to make a subsequent guess as to what was, in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

Under the Third Circuit's ruling in your Petitioner's case, one would have to guess whether the necessary finding of probable cause was made and the defendant might be convicted on the basis of facts not found by the grand jury which indicted him.

---

2. During the trial, Frederick Hesse, Sr. was called by the Government as a witness. Frederick Hesse, Sr. had admitted that he embezzled funds at the Hershey

(Pennsylvania) National Bank. The charge against Zarra was for Zarra's alleged participation with Hesse.

In the jury instructions (App. 13-29), the judge stated: In connection with your consideration of evidence with respect to whether embezzlement occurred and whether Defendant aided and abetted, you have heard the testimony of Fred Hesse. He is what is known in law as an accomplice. An accomplice is one who voluntarily participates in the commission or the planning of a crime. The witness, Fred Hesse is an accomplice *of the accused* in this case. That is, he would be if you find he embezzled the money. (Emphasis added.)

This charge was completely prejudicial to the Defendant, as it assumed the guilt of the Defendant and carried with it an implication that the Defendant's guilt had been determined by the trial court. This fact is peculiarly within the province of the jury to determine.

Even if the record furnished any basis for the contention that Hesse was an accomplice, it was a question for the jury. See, *United States v. Balodimas*, 177 F. 2d 485 (7th Cir. 1949), citing *Holmgren v. United States*, 217 U.S. 509 (1910); *United States v. Beadon*, 49 F. 2d 164 (2nd Cir. 1931).

After the jury was instructed that Hesse committed a crime, it was further instructed that Hesse was an accomplice *of the accused*. The prejudicial effect of tying an admittedly guilty party with one who is presumed innocent in jury instruction is obvious. See, *State v. Filbert*, 436 P. 2d 959 (Wyo. 1968); *Raulerson v. State*, 102 So. 2d 281 (Fla. 1958). Cf. *United States v. Balodimas*, 177 F. 2d 485 (7th Cir. 1949).

In *United States v. Fellabaum*, 408 F. 2d 220 (7th Cir. 1969), cert. denied, 396 U.S. 858 (1969), the court decided that an identical charge was erroneous but that it did not have "substantial influence" on the jury. In the Petitioner's case, the only instruction given to the jury on the weight of an accomplice's testimony was prejudicial and it certainly had a substantial influence on the jury.

Where a charge concerning accomplice testimony is prejudicial to the rights of a defendant, a new trial must be ordered. See, *United States v. Balodimas*, 177 F. 2d 485 (7th Cir. 1949), citing, *Holmgren v. United States*, 217 U.S. 509 (1910); See also, *Bursten v. United States*, 395 F. 2d 976 (5th Cir. 1968). Any other result would allow a judge to usurp the function of the jury.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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APPENDIX

[Caption omitted]

INDICTMENT

The Indictment filed by the United States, No. 14225, against Ralph Louis Zarra in violation of 18 U.S.C. 656, 2 charges as follows:

> That from on or about December 1, 1963, to on or about November 1, 1965, at Hershey, Dauphin County, Commonwealth of Pennsylvania, in the Middle District of Pennsylvania and within the jurisdiction of this Court,
>
> RALPH LOUIS ZARRA,
>
> did aid, abet, counsel, command, induce or procure Frederick DeLancey Hesse, who, being an officer, that is Head Teller and Assistant Cashier of the Hershey National Bank, Hershey, Pennsylvania, a National Bank whose deposits are insured by the Federal Deposit Insurance Corporation, wilfully and knowingly and with the intent to injure and defraud the said bank, did embezzle the sum of $101,000.00 of the funds and credits of the bank which had come into his possession and under his care by virtue of his position as such officer.
>
> In violation of Title 18 United States Code, Sections 656 and 2.

[Caption omitted].

JURY INSTRUCTIONS

(344) BY THE COURT:

Members of the Jury:

You are the sole judges of the facts in this case and you are duty bound to follow the law as stated in these instructions and to apply the law that I give to the facts as you find them and you must find the facts from the evidence before you.

Don't single out one instruction alone as stating the law but consider the instructions as a whole.

You are not to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than (345) that given in these instructions.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "Not Guilty" plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The accused and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated in these instructions and reach a just verdict, regardless of the consequences. If you are

convinced after these instructions that the defendant is not guilty, you should acquit him; if you are convinced after these instructions that the defendant is guilty, then you should do your duty and convict him.

I am not going to review the facts or the testimony or the evidence. I might refer to some of it. But, of course, as both counsel have told you, you are the sole judges of the facts and it is your recollection that governs, not mine and not counsel's. And if I do refer to some of the testimony—I don't know whether I will or not—it will be only to explain some principle of law.

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate"—with no evidence against him. The law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant unless the jurors are satisfied beyond (346) a reasonable doubt of the defendant's guilt from all the evidence in the case.

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. A reasonable doubt is one that is sufficient to cause a reasonably prudent person to hesitate to act in the most important affairs of his life.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential ele-

ment of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence.

Where two conclusions may reasonably be drawn from the evidence, the one of guilt and the other of innocence, you should reject the one of guilt and accept the one of innocence and in that event find the defendant "not guilty".

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

An indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

(347) There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence—such as the testimony of an eyewitness. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the commission of the crime or of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of all witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Now, again, the evidence is heard from the witness stand—the testimony you have heard—that is sworn testimony, that is why it is evidence. What counsel tells you is not evidence. They are not under oath. Exhibits admitted—that is evidence. And any stipulations that are made—that is evidence. And any (348) presumptions that apply as stated in these instructions. Everything else is not evidence. These counsel are entitled to argue to you to try to persuade you in your reasoning and mental processes to a belief in the merit of their respective positions. That is argument. They have a right to argue, to tell their conclusions and deductions. But they have no right to state things that are not in the record.

So you consider only the evidence in this case. However, in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

An inference is a deduction or a conclusion which reason and common sense lead the jury to draw from facts which have been proved.

A presumption, on the other hand, is a conclusion which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence to the contrary; but unless so outweighed the jury is bound to find in accordance with the presumption.

Unless and until outweighed, beyond a reasonable doubt, by evidence to the contrary, the law presumes that a person is innocent of crime or wrong; and that the law has been obeyed.

Now, the offense charged here is aiding and abetting a bank embezzlement.

It is charged in this indictment:

> "That from on or about December 1, 1963, to on or about November 1, 1965, at Hershey, Dauphin County (349) Commonwealth of Pennsylvania, in the Middle District of Pennsylvania and within the jurisdiction of this Court, that Ralph Louis Zarra did aid, abet, counsel, command, induce or procure Frederick DeLancey Hesse, who, being an officer, that is, Head Teller and Assistant Cashier of the Hershey National Bank, Hershey, Pennsylvania, a National Bank whose deposits are insured by the Federal Deposit Insurance Corporation, wilfully and knowingly and with the intent to injure and defraud the said bank, did embezzle the sum of $101,000.00 of the

funds and credits of the bank which had come into his possession and under his care by virtue of his position as such officer.

"In violation of Title 18 United States Code, Sections 656 and 2."

Now, that is the indictment.

So that you can fully understand the crime whose commission the defendant is charged to have aided and abetted, I will instruct you first on the offense proscribed by Section 656 of Title 18 United States Code which deals with embezzlement by bank officers or employees.

Section 656 of Title 18 of the United States Code provides in part that:

"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve Bank, member bank, national bank or insured bank . . . embezzles, . . . any of the moneys, funds or credits of such bank"

shall be guilty of an offense against the laws of the United States:

(350) Two essential elements are required to be proved in order to establish the offense of embezzlement:

First: The act or acts of embezzling the funds of a member bank of a Federal Reserve Bank by an employee of such member bank, as charged in the indictment; and

Second: Doing such act or acts knowingly and willfully.

As stated before, the burden is upon the prosecution to prove beyond all reasonable doubt every essential element of the crime charged.

You heard the testimony. Do you believe Mr. Hesse when he says he embezzled $101,000? You have this testimony. You have all the other testimony. As counsel said, there isn't much denial that Mr. Hesse did embezzle $101,000. I don't think the defendant denies it. He just denies that he aided and abetted.

The term "embezzlement", as used in the statute means the unlawful taking or conversion by a person to his own use of funds or moneys which came into his custody or possession lawfully by virtue of his office or employment. So, to constitute embezzlement of the funds or moneys of a bank by an employee, within the statute, it must appear from the evidence beyond a reasonable doubt that the funds or moneys came lawfully into the possession of the employee, and were, while so held by him, unlawfully applied or converted to his own use.

You heard the testimony by Mr. Hesse as well as the chief bank officer that at least some of the vault cash was in the custody of Mr. Hesse. You see, that is the difference. Embezzling differs from stealing in that embezzling is—when you have an embezzlement you first have lawful possession, and every bank teller has lawful possession of the money in the cage, for example, but after getting possession lawfully and rightfully, if (351) he then converts it to his own use, that is embezzling. Stealing, on the other hand, is not having lawful possession of something but taking it. A janitor who is in a bank and cleaning up, when the teller's back was turned, takes a $100 bill from

the drawer, that would be stealing. The janitor doesn't have lawful possession of that. But if the teller has lawful possession of that and converts it to his own use, that is embezzling. Now, that is the difference.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

Now, before going any further, I want to at this point say something about some evidence that came in the case early – I will give you that in a minute.

The word "knowingly" means that the act was done voluntarily and purposely, and not because of mistake or accident. Now we are still talking about embezzlement. It must be done knowingly.

The word "knowingly" means that the act was done voluntarily and purposely, and not because of mistake or accident. Knowledge may be proven by conduct, and by all the facts and circumstances surrounding the case. No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate.

The word "wilfully" means that the act was committed voluntarily, with knowledge that it was prohibited by (352) law, and with the purpose of violating the law, and not by mistake, accident or in good faith.

Now, as I said here; this defendant is charged with aiding and abetting this crime of Mr. Hesse.

Section 2 of Title 18 of the United States Code provides:

> "Whoever commits an offense against the United States, or willfully aids, abets, counsels, commands; induces, or procures its commission, is punishable as a principal.

and

> "Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Every person who thus willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and purposely and with specific intent to do some act the law forbids, or with specific intent to fail to do some act the law requires to be done; that is to say, with evil motive or bad purpose either to disobey or to disregard the law.

Before you may find that the defendant committed the offense charged through aiding or abetting, you must first find beyond a reasonable doubt that the offense charged was committed by someone; in other words, you have to first find beyond a reasonable doubt that the offense charged was committed by Mr. Hesse. If the offenses were not committed, the defendant cannot be found to have aided or abetted. You have to aid and abet someone with the crime charged in the indictment. If you are satisfied beyond a reasonable (353) doubt that the offense was committed by Mr. Hesse, you may then consider

whether the defendant aided and abetted in the commission of the offense.

In order to aid and abet another to commit a crime it is necessary that a defendant willfully associate himself in some way with the criminal venture; and that he willfully participate in it as in something he wishes to bring about; and that he willfully seek by some action of his to make it succeed. Now, you recall what I said a moment ago in talking about embezzlement about the meaning of the term "willfully". That applies here too.

And I want to say this also:

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted.

You will note in the indictment that the indictment charges that the offenses were committed "on or about" a certain date. I think it says "from on or about December 1, 1963, to on or about November 1, 1965". It is not necessary that the proof establish with certainty the exact date of the alleged offense. It is sufficient if the evidence shows beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

(354) In connection with your consideration of evidence with respect to whether an embezzlement occurred and whether the defendant aided and abetted it, you have heard the testimony of Fred Hesse. He is what is known in the law as an accomplice. An accomplice is one who voluntarily participates in the commission or the planning of a crime.

The witness Fred Hesse is an accomplice of the accused in this case. That is, he would be if you find he embezzled the money. As an accomplice his testimony must be carefully examined and weighed with great care. The testimony of an accomplice in connection with the crime charged, if believed by the jury, may be sufficient to sustain a verdict of guilty, even though not corroborated or sustained by other evidence. It is to be preferred that there be some corroboration of the substantive part of the accomplice's testimony. The extent to which there has been such corroboration, if any, is for the jury. However, corroboration is not absolutely necessary and a defendant may under our system be convicted on the uncorroborated testimony of an accomplice if the jury believes the testimony of the accomplice and if it establishes in the mind of the jury the guilt of the defendant beyond a reasonable doubt.

Now you have the testimony of Mr. Hesse. Has that been corroborated? That is for you to determine. The Government argues that certain things are clear corroboration. They say that the taxi trips to Hershey and bringing back envelopes is one; that Mr. Zarra in depositing the money in the Lebanon Valley Bank in the account of Mr. Hesse is more corroboration. They say that all these

bank officers came in, they testified that these deposits were made, they were made by Mr. Zarra, and before making the deposit—there were large sums, you remember (333) one was over $90,000, as I understand the testimony—before doing that, there were two or three officers came in here and testified that money orders were purchased at various banks. All of that, the Government says, is corroboration. That is up to you. It is for you to decide and determine. Does that corroborate Mr. Hesse and whatever other corroboration you have?

As I said before, I don't intend to review everything. I am only trying to explain the testimony, and I certainly don't intend to give it all to you.

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence; motive, state of mind and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which a witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant

detail, and whether the discrepancy results from innocent error or wilful falsehood.

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

(356) The Government has the burden, as I said, of proving beyond a reasonable doubt that the defendant is guilty of the crime charged, and the defendant's decision not to testify can not in any way be considered as a circumstance against him. He has a right not to take the stand and the fact he did not take the stand is not to be used by you as evidence against him.

I also want to comment on some evidence that was introduced early in the case.

You will recall the indictment charges that the defendant aided and abetted Mr. Hesse in the embezzlement between these two dates: "From on or about December 1, 1963, to on or about November 1, 1965."

Now, you will also recall early in the case there was evidence here, as I recall it—your recollection governs—of about a $22,000 shortage at the bank. I think that testimony by Mr. Hesse was that was checks that he would hold, checks drawn on accounts there, one of the accounts in the name "Howard Brooks". Mr. Hesse testified "Howard Brooks" was a name used by Mr. Zarra. As I recall

his testimony, he said he saw Mr. Zarra sign the card that is used to open an account and he signed it in the name of "Howard Brooks". You will recall he said checks were drawn on that account, there weren't enough funds there to take care of them and he would hold them—did he hold them?—and at one time it amounted to $22,000, that he took it up with his family and by making various loans and with some money obtained from Mr. Leo that money was paid back.

Now I say this to you: That was back in 1962. That is not within the times charged in this indictment. Now, why did we permit it? For only one reason: To be used by you for whatever weight you want to give it to show knowledge or intent on the part of Mr. Zarra. It is not substantive evidence against him because he is not charged with aiding and abetting anything that happened back in 1962.

Also both counsel in their closes have referred to "suppressed evidence"—as I understand it, some of these (357) defendant's exhibits—these receipts and the envelopes. There were many of them—hundreds of them. Counsel has told you that is part of the evidence that was suppressed. So you won't have any misunderstanding about it since counsel has brought that element in his case and argued it, I want to say this to you: That the defendant—he was within his right in doing it—petitioned this Court to have evidence which had been seized from his office and some place—I think some room—I may say he petitioned to have this Court suppress the evidence and return it to him on the ground when that evidence was taken, a search warrant had not been procured as provid-

ed by the Fourth Amendment to the Constitution. This Court saw fit to suppress it. He was within his right in filing that petition and having the evidence suppressed. I say that to you so that you understand what "suppressed evidence" means—at least in this case.

Now your verdict must be unanimous—

Before I get to that, I want to say: In considering the evidence, any knowledge obtained by the defendant after November, 1963, concerning the source of Mr. Hesse's funds before that date can not in any way constitute the knowledge required as an element of the crime charged.

Now, your verdict must be the considered judgment of each juror. You must agree on your verdict. Therefore, your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your (358) own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Does counsel have anything to add or any objections?

May I see you at sidebar?

(Sidebar)

BY MR. DESFOR:

Your Honor, we believe that you have covered the charges under 656 under the embezzlement, but we do not feel you may have made it clear to the jury that the crime with which Mr. Zarra is charged requires that there is knowledge that that money was taken from the bank, as we asked in our No. 5.

BY THE COURT:

Do you want me to give No. 5, in other words?

BY MR. DESFOR:

Yes, Your Honor.

BY THE COURT:

Is that what you want?

BY MR. DESFOR:

Yes, Your Honor.

(End of Sidebar)

BY THE COURT:

Members of the Jury, if after considering all of the evidence presented, you have a reasonable doubt as to whether the defendant had knowledge from December 1, 1963 to November 1, 1965 that the money obtained from Fred Hesse came from the Hershey (359) National Bank, then you must find him "not guilty".

(Sidebar)

BY MR. DESFOR:

We would ask that you specifically state to them that one of the elements of this crime requires a knowledge and intent.

BY THE COURT:

Maybe I didn't say it.

(End of Sidebar)

BY THE COURT:

One of the elements of this crime is, as with every crime, you must have knowledge and intent.

(Sidebar)

BY THE COURT:

Is that what you want me to say?

BY MR. DESFOR:

Yes.

BY THE COURT:

Is that what you want?

BY MR. DESFOR:

Sure.

We want the knowledge that money was taken from the bank.

BY THE COURT:

I just said that.

BY MR. DESFOR:

We would like to take a general exception to the charge.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 14,255 Criminal

United States of America

v.

Ralph Louis Zarra

OPINION OF THE COURT

Defendant, Ralph Louis Zarra, was charged in a one count indictment with aiding and abetting Frederick DeLancey Hesse, head teller of the Hershey National Bank, in the embezzlement of $101,000 from the bank, in violation of 18 U.S.C.A., §§656 and 2:

"The Grand Jury charges:

"That from on or about December 1, 1963, to on or about November 1, 1965, at Hershey, Dauphin County, Commonwealth of Pennsylvania, in the Middle District of Pennsylvania and within the jurisdiction of this Court,

Ralph Louis Zarra,

did aid, abet, counsel, command, induce or procure Frederick DeLancey Hesse, who, being an officer,

that is, Head Teller and Assistant Cashier of the Hershey National Bank, Hershey, Pennsylvania, a National Bank whose deposits are insured by the Federal Deposit Insurance Corporation, wilfully and knowingly and with the intent to injure and defraud the said bank, did embezzle the sum of $101,000.00 of the funds and credits of the bank which had come into his possession and under his care by virtue of his position as such officer.

"In violation of Title 18 United States Code, Sections 656 and 2."

The jury returned a verdict of guilty. Defendant's motions for judgment of acquittal or for a new trial, and in arrest of judgment are before the court.

The Government introduced evidence from which the jury could have found the following facts.[1] Hesse was assistant cashier and head teller of the Hershey National Bank by whom he had been employed for 33 years. Defendant was secretary of the Fraternal Order of Eagles in Harrisburg. In 1961, defendant, with Hesse's knowledge, opened an account in the bank under the name "Howard Brooks". Shortly after it was opened, it was overdrawn on several occasions, but each time defendant gave money to Hesse to cover the overdrafts. On subsequent occasions, defendant told Hesse he did not have the money and asked him to "Hold them [checks] a couple of days." For a time defendant covered these checks, but later defendant did not, and it was too late under the regulations for Hesse to return the checks to the depository banks. In November 1962, the overdrafts on the Howard

[1] Defendant did not testify and presented no evidence.

Brooks account amounted to $22,000. Hesse became panicky because he had used vault cash to pay the checks. After discussions with defendant, $22,000 was raised to replace the vault cash by obtaining $10,000 from Mr. Leo, a debtor of defendant, and $12,000 in loans obtained by Hesse's children. Defendant agreed to pay Hesse the $12,000 at $150 a week. He made payments totaling $4,250, but about January 3, 1964, told Hesse he could not continue, that he was in need of an additional $6,000 to buy pinball machines, and asked Hesse to get it from the bank. Hesse said if he did and Mr. Baum, the cashier of the bank, learned about it, he would fire him. Defendant said then he would get a car and run down Mr. Baum. He also told Hesse there would be no payments on his money unless he got the $6,000, whereupon Hesse gave it to him in return for a percentage of income from the machines. Defendant made payments for several weeks until agents of the Pennsylvania Liquor Control Board confiscated the machines. Hesse then gave defendant $7,500 for more machines. Defendant made more demands for money. Hesse gave him $5,000 for a loan to Charles Ench, who was to pay a bonus of $1,000, $3,000 to pay a mortgage on defendant's house, $2,500 to buy a car, $1,300 for TV sets, $5,000 to run a dice game, money for a public license for the Eagles, $9,000 for a F. DeSanto, $4,800 for Dorothy Keim, $3,000 for William Fry, $4,800 for John Ramsey, $6,000 for Max Waxman, $2,400 for Helen Carrichio, and others. Hesse never met these people. Defendant made the calls for the money. Hesse took it from vault cash and gave it to taxi drivers for delivery to defendant. Defendant knew all of this money was embezzled by Hesse from the bank.

Hesse concealed his shortages in this manner. He had an account with a small balance at the Lebanon Valley National Bank, Lebanon, Pennsylvania. At all times he had a check in his teller's cage for the exact amount of the shortages. If, for example, it was $90,000, he wrote a check for this amount and put it in his drawer and counted it as cash to balance each day's accounts. If the bank examiners came in, he dated the check and put it through the machine as a cash check so that it would take the place of cash. After the examiners counted the cash for that day, they released the cash and then he would take the cash out of the bank and have it delivered to the Lebanon bank and deposited in his account. He had time to accomplish this because his check went from the Hershey bank through Philadelphia to the Lebanon bank via the Federal Reserve. This took about three days. The ledger sheets of the Lebanon bank showed that the two largest deposits were $80,000 on October 4, 1965, and $91,200 on October 11, 1965. On at least three occasions defendant deposited the money for Hesse in the Lebanon bank. Hesse gave the money to a taxi driver who drove defendant either to the Lebanon bank to make the deposit, or to other area banks where defendant purchased cashier's checks or money orders with the cash and then deposited these in the Lebanon bank. On November 1, 1965, Hesse was in an automobile accident and suffered injuries which required his hospitalization. On November 4, Hesse told the president of the bank of his shortage, which then was $101,000. While in the hospital Hesse had several conversations with the defendant, and convinced him that the bank was not going to reval the shortage. Subsequently, defendant sent about $4,000 to Hesse in the hospital to

apply on the shortage. On January 19, 1966, defendant executed and delivered to the Hershey bank a note for the balance of $97,000.

The reasons advanced in support of the several motions will be considered together.

Sufficiency of the Indictment: Defendant argues that: the indictment is vague and uncertain and does not inform him of the charges against him; it is insufficient so as to permit defendant to plead the judgment in any other prosecution for the same offense; it fails to "establish" any necessary facts of the offense of Hesse whom defendant aided and abetted; it fails to set forth "factual evidence" of the common involvement of Hesse and defendant; it does not "indicate" the commission of any criminal act against the United States; and it is "factually insufficient" to charge defendant with violating the statutes enumerated.

It is not necessary to cover these arguments in detail. Suffice to say that an indictment is sufficient if it substantially follows language of the statute or uses words of similar import. United States v. Chunn, 4 Cir. 1965, 347 F. 2d 717. An indictment charging a statutory offense in language and containing allegations necessarily or fairly importing guilty knowledge need not contain formal words "knowingly", "wilfully", "feloniously" or "unlawfully". United States v. Amorosa, 3 Cir. 1948, 167 F. 2d 596; United States v. Barrow, E.D. Pa. 1962, 212 F. Supp. 837, *rev'd in part on other grounds*, 3 Cir. 1966, 363 F. 2d 62. The indictment charged defendant with aiding, abetting, counseling, commanding, inducing or procuring Hesse, an officer of the bank, who, "wilfully and knowingly and with intent to injure and defraud the

bank", embezzled the funds, in violation of 18 U.S.C.A. §§656 and 2. This charge of aiding and abetting was sufficient. United States v. Tornabene, 3 Cir. 1955, 222 F. 2d 875; United States v. Johnson, 4 Cir. 1964, 337 F. 2d 180, 196; United States v. Brown, 2 Cir. 1964, 335 F. 2d 170; Logsdon v. United States, 6 Cir. 1958, 253 F. 2d 12; United States v. Barrow, supra; United States v. Quinn, E.D. N.Y. 1953, 111 F. Supp. 870.

Admissibility of Prior Transactions: Defendant contends the evidence of the Howard Brooks account was inadmissible. The evidence was admissible on several grounds. In his opening to the jury, defense counsel stated that defendant would show that there were innocent "loans" between Hesse and defendant. The evidence showed that the transactions were quite different than "arm's length" loans. These prior transactions, involving as they did, embezzlements from the same bank and closely related in time to the offense charged, also constituted similar offenses relevant to show knowledge and intent. 1 Wigmore, Evidence, §217, 2 Id. §§300-302; United States v. Weiler, 3 Cir. 1967, 385 F. 2d 63, 68; United States v. Johnson, 3 Cir. 1967, 386 F. 2d 630; United States v. Laurelli, 3 Cir. 1961, 293 F. 2d 830; United States v. Stirone, 3 Cir. 1958, 262 F. 2d 571, *rev'd on other grounds*, 1960, 361 U.S. 212; Zamora v. United States, 10 Cir. 1966, 369 F. 2d 855; Pardo v. United States, 5 Cir. 1966, 369 F. 2d 922, 924; United States v. Byrd, 2 Cir. 1965, 352 F. 2d 570. The prior misappropriations of funds by Hesse and defendant were relevant on whether defendant knowingly and intentionally aided and abetted, or counseled and procured Hesse in the misappropriations charged in the indictment. Finally, after

Hesse refused to embezzle the $6,000 for the pinball machines, defendant threatened to go to the officials of the bank and tell them about the prior shortage. And, when at first Hesse refused the request for $7,500 for more machines, defendant said, "'How do your children go to school?' I [Hesse] said, 'They walk'. He said, 'Well, you have to give me this money or I will have to take care of your children'—which I [Hesse] took as a threat to the children at that time." The jury was instructed on the limited purposes for which the evidence was admitted.

Sufficiency of Evidence and Instructions—Testimony of Accomplice: Defendant argues that the testimony of Hesse was not sufficient to sustain a conviction and complains of the court's failure to instruct the jury on several "rules" relating to the testimony of an accomplice. Defendant requested that the jury be charged:

> "6. The Government's witness, Mr. Fred Hesse, has pleaded guilty to a charge of embezzlement; and his testimony in light of the alleged conspiracy must be scrutinized and examined very carefully. When considering the credibility, that is the believability, of the Government's witness, Mr. Fred Hesse, the testimony of a conspirator and accomplice, it should be corroborated by other testimony before giving too much credence to such testimony."

The court questioned this because it appeared to be a request to instruct the jury to disregard the testimony of an accomplice if it was not corroborated.[2] Defense coun-

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[2] "By the Court:

sel, however, was permited to argue this point in his closing speech. The jury was charged:

> "In connection with your consideration of evidence with respect to whether an embezzlement occurred and whether the defendant aided and abetted

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Where is your authority for No. 6 because it is contrary to the law as I understand it. The last part—it is exactly contrary to what I am going to tell them— .

By Mr. Desfor:

The last sentence or the whole part?

By the Court:

The last sentence. (Continuing) It doesn't need corroboration at all.

By Mr. Desfor:

It does not require corroboration in order to make out a case. However, going to credibility, before the jury can give too much credence to this testimony for credibility, it should be corroborated.

By the Court:

Where is your authority for that?

By Mr. Desfor:

I will show Your Honor the case.

By the Court:

You show me the case and I will hold it. That is the same as saying you need corroboration. The cases say you don't.

By Mr. Desfor:

It goes only to a question of credibility, not to sufficiency of the evidence.

By the Court:

You say you have a case on it?

By Mr. Desfor:

Yes, I do.

By the Court:

It should have been in here. That is one thing I neglected to ask you to do. You should have given me a case on that. You can argue it."

it, you have heard the testimony of Fred Hesse. He is what is known in the law as an accomplice. An accomplice is one who voluntarily participates in the commission or the planning of a crime.

"The witness Fred Hesse is an accomplice of the accused in this case. That is, he would be if you find he embezzled the money. As an accomplice his testimony must be carefully examined and weighed with great care. The testimony of an accomplice in connection with the crime charged, if believed by the jury, may be sufficient to sustain a verdict of guilty, even though not corroborated or sustained by other evidence. It is to be preferred that there be some corroboration of the substantive part of the accomplice's testimony. The extent to which there has been such corroboration, if any, is for the jury. However, corroboration is not absolutely necessary and a defendant may under our system be convicted on the uncorroborated testimony of an accomplice if the jury believe the testimony of the accomplice and if it establishes in the mind of the jury the guilt of the defendant beyond a reasonable doubt.

"Now you have the testimony of Mr. Hesse. Has that been corroborated? That is for you to determine. The Government argues that certain things are clear corroboration. They say that the taxi drivers to Hershey and bringing back envelopes is one; that Mr. Zarra in depositing the money in the Lebanon Valley Bank in the account of Mr. Hesse is more corroboration. They say that all these bank officers came in, they testified that these deposits were made, they were made by Mr. Zarra, and before making the de-

posit—there were large sums, you remember one was over $90,000, as I understand the testimony—before doing that, there were two or three officers came in here and testified that money orders were purchased at various banks. All of that, the Government says, is corroboration. That is up to you. It is for you to decide and determine. Does that corroborate Mr. Hesse and whatever other corroboration you have?"

After the charge, defense counsel asked that the court elaborate on the instructions and tell the jury that to convict, it must find that defendant knew the money was misappropriated from the bank, which the court did by reading defendant's point No. 5;[3] other than that, only a general exception was taken.[4]

The only point raised at the trial which defendant still presses is that the uncorroborated testimony of an accomplice is of little or no weight in a determination of defendant's guilt. This, of course, is not the law in federal criminal prosecutions. Krulewitch v. United States, 1949, 336 U.S. 440; Caminetti v. United States, 1917, 242 U.S. 470; Dunn v. United States, 5 Cir. 1963, 318 F. 2d 89. The instructions on the testimony of an accomplice were full and complete and afforded more than adequate safeguards to insure close examination of the accomplice's testimony. United States v. Bozza, supra; United States v. Vita, 2

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[3] Defendant's point No. 5: ". . . if after considering all of the evidence presented you have a reasonable doubt as to whether the defendant had knowledge from December 1, 1963 to November 1, 1965 that the money obtained from Fred Hesse came from the Hershey National Bank, then you must find him 'not guilty.'"

[4] Tr. 358-9.

Cir. 1961, 294 F. 2d 524; cf. e.g., Manual on Jury Instructions Criminal, §6.07, 35 F.R.D. 377. Since there was substantial corroborating evidence,[*] the instruction need not even have been given; it was given because of the extremely unlikely event that the jury might disbelieve all the corroborating evidence and have before it, therefore, only the uncorroborated testimony of Hesse. Christy v. United States, 9 Cir. 1959, 261 F. 2d 357.

In a point raised in his supplemental brief, defendant argues that the court erred when it told the jury that Hesse was an accomplice of the defendant because by implication this was telling the jury that defendant was guilty. The court told the jury that Hesse should be considered an accomplice of the defendant if it found that he embezzled the money. This was for the purpose, however, of explaining the manner in which they should consider the testimony of an accomplice. To argue that in effect the court told the jury that defendant's guilt was established is to take this instruction completely out of context. The jury

[*] Hesse's testimony on the disposition of embezzled funds was corroborated in part by the testimony of the taxi drivers, Harry King, Edward Placido and Edward Darrow; by Lloyd Miller and Melvin Lamb of the Farmers Bank and Trust Company of Hummelstown; Ronald L. Hesse and Dorothy Watkins of the Hummelstown National Bank; Clyde W. Gabel of the Dauphin Deposit Trust Company, Eileen Heaps and Jay Blough of the Lebanon Valley National Bank. These witnesses testified to various transactions involving monies deposited in Hesse's account in the Lebanon Bank, including that defendant used taxi drivers to pick up cash from Hesse at the Hershey bank, and that the cash was used by defendant to purchase bank checks in large amounts. In addition, there was an abundance of documentary corroborating evidence.

had previously been instructed on the presumption of innocence, the Government's burden to prove guilt beyond a reasonable doubt, that the jury were sole judges of the fact, the essential elements necessary to show the offense of embezzlement and the offense of aiding and abetting such embezzlement, etc. Hesse was not a codefendant at the trial, nor was he charged as one in the indictment; he had previously pleaded guilty to the embezzlement and freely admitted it in his testimony. There was no evidence to the contrary. If defendant thought that this part of the charge, taken out of context, was improper, he should have called it to the attention of the court. He failed to do so. With a similar situation before it, the court in United States v. Rinaldi, 2 Cir. 1962, 301 F. 2d 576, said:

> "Taken as a whole the charge is plainly sufficient. If the language in the portions attacked, taken out of context, is in any way open to criticism, it could have been corrected had criticism of it been called to the attention of the court, or exception taken. Where no exception is taken, we will not consider alleged errors in the charge unless substantial prejudice resulted. . . . Reference to the involvement of a witness not charged with the crime was called for, in order to meet the need for cautionary instructions on the weight to be given testimony of an accomplice, and certainly was not harmful to defendants. . . ."

Moreover, defendant specifically requested the court to instruct the jury that Hesse was an accomplice. In point No. 6, quoted above, defendant requested in part: ". . . When considering the credibility, that is the believability of the Government's witness, Mr. Fred Hesse, *the testi-*

mony of a conspirator and accomplice, it should . . . [etc:]." (Emphasis supplied.) If this was error, defendant asked for it, and cannot complain. United States v. Scoblick, M.D. Pa. 1954, 124 F. Supp. 881, aff'd 3 Cir. 1955, 225 F. 2d 779. United States v. Gorman, 7 Cir. 1968, 393 F. 2d 209; cf. United States v. Grosso, 3 Cir. 1966, 358 F. 2d 154, *rev'd. on other grounds*, 1968, 390 U.S. 62.

Defendant relies on United States v. Balodimas, 7 Cir. 1949, 177 F. 2d 485.[6] That case is distinguishable in several important respects and is not controlling. First, in Balodimas, an income tax evasion case, the witnesses testified to procedures under which, at defendant's instructions, they withheld cash and checks from each day's business; the defendant freely admitted this but offered an explanation which, if believed, would have exonerated him. The trial court characterized the witnesses as lawbreakers. The court of appeals said:

> ". . . Ordinarily in a criminal trial there is no question but that a crime has been committed; the question at issue is whether it was committed by the defendant. Here, we have the reverse of that situation. The question for determination was whether a crime had been committed. The effect of this instruction was to resolve that question in the affirmative. . . ."

In the instant case there was no evidence which would have justified a finding that an embezzlement had not occurred.

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[6] Cf. also United States v. Battaglia, 7 Cir. 1968, 394 F. 2d 304.

Hesse was an admitted lawbreaker. The real question was whether defendant aided and abetted and the jury was fully instructed on this. Second, the record in Balodimas did not support the Government's argument that the instruction given had been requested by defendant. It is true that in dictum the court stated that such a request would not appear to alter its opinion, and also rejected the argument that defendant failed to object to the instruction, because the instruction constituted plain error. Each case, however, must rest on its own facts. The rule that an appellate court, in its discretion, may recognize matters which were not objected to or even which were invited by a defendant, when they constitute plain error, is subject to qualification. Plain error will require reversal only when a manifest miscarriage of justice would result, viewed in the light of all the evidence, and the effect which the erroneous instruction would have on the verdict. Here, the evidence was overwhelming that defendant aided and abetted the commission of the crime, and the instruction, even if erroneous, could not have influenced the verdict. In United States v. Grosso, supra, the court said:

> "However, if appellant's counsel was of the opinion that the errors were prejudicial it was his obligation to interpose a timely objection and seek corrective action by the Court. . . . He should have taken this course when he learned of the errors, but failed to do so. A defendant may not sit idly in the face of obvious error and later take advantage of a situation which by his inaction he has helped to create. . . .
>
> "Although not required to do so, we are empowered to consider the alleged errors on the merits if they affected the 'substantial rights' of the appellant.

> The power is discretionary and should be exercised only in those situations in which the failure to do so would result in a manifest miscarriage of justice. . . . We do not have such a situation in the instant case.
>
> "We find upon our review of the record that the evidence as to the appellant's guilt was overwhelming and that therefore there was no reasonable likelihood that the judge's instruction to the jury influenced the verdict. We are of the opinion that under the circumstances reversal on the ground urged is not warranted. . . ." (Citations omitted.)

And in Lyons v. United States, 9 Cir. 1963, 325 F. 2d 370, the court in its instructions assumed an important, but uncontroverted fact, material to defendant's conviction. The court of appeals noted the implied consent of defendant's counsel to the instruction:

> "Thus, appellant, through his attorney, impliedly consented to the proposed instruction concerning his professional status. This implied consent, when considered together with his failure to object to, and apparent acquiescence in the instruction, when it was actually given, shows that ultimately appellant's status as a suspended attorney was an admitted and uncontroverted fact.
>
> "Although an instruction which assumes a fact which is in issue is prejudicially erroneous, Roe v. United States, 287 F. 2d 435 (5th Cir. 1961), Carothers v. United States, 161 F. 2d 718 (5th Cir. 1947), an instruction, such as the one given here, which assumes an admitted or uncontroverted fact, is not re-

versible error. Malone v. United States, 238 F. 2d 851 (6th Cir. 1956). United States v. Jonikas, 197 F. 2d 675 (7th Cir. 1952), cert. denied 344 U.S. 877, 73 S. Ct. 171, 97 L. Ed. 679. Nordgren v. United States, 181 F. 2d 718 (C.A. 9 1950).

"Moreover, in the course of its instructions, the trial court several times advised the jury that it is the sole judge of the weight of the evidence and the credibility of witnesses. Such an instruction would not cure a prejudicial error in a charge; United States v. Gollin, 166 F. 2d 123 (3rd Cir. 1948), cert. denied 333 U.S. 875, 68 S. Ct. 905, 92 L. Ed. 1151; but in a case such as this, it lends support to the conclusion that there was no 'miscarriage of justice.' Herzog v. United States, supra, 667 (on rehearing).

"In view of the foregoing, we hold that the trial court did not commit plain or reversible error in including the instruction set out above in its charge to the jury."

See also United States v. Rinaldi, supra.

The instruction was beneficial to defendant. If the court had left to the jury the question of whether Hesse was an accomplice, and they found he was not, the admonition to scrutinize his testimony with great care and that corroboration is preferred would not be applicable. In Coleman v. United States, 9 Cir. 1966, 367 F. 2d 388; the court said:

". . . Similarly, his cautionary instruction concerning testimony of an accomplice was proper, for the jury might have considered the government's wit-

ness Hunter, who wrote the holdup note, a participant in the crime. But even if abstract, the instruction was beneficial rather than harmful to defendants. . . ."

Finally, an instruction as a matter of law that a witness is an accomplice, where the fact of his participation in the crime charged is uncontroverted, is proper.[7] In United States v. Scoblick, supra, the court charged the jury:

"'One witness, Michael Senio, testified, *who by his own confession is an accomplice*. The testimony of an accomplice in crime should be received with caution, and you should carefully scrutinize the testimony of such accomplice before giving it much weight, but there is no rule of law forbidding a conviction on such testimony * * *.'" (Emphasis supplied.)

The court of appeals (United States v. Scoblick, 3 Cir. 1955, 225 F. 2d 779, 783) approved of this instruction. In Coronado v. United States, 9 Cir. 1968, 390 F. 2d 16, 18, the court approved the following:

"'Again, as I say, the question, the sole question to determine here is whom you are going to believe. Do you believe Mr. Reinoehl beyond all reasonable doubt, or do you believe the defendant here? As I told you, Mr. Reinoehl is an accomplice, and you are to view his testimony with caution and with great care, and you have to be satisfied beyond all reasonable doubt here in order to establish the guilt of the

[7] See Manual on Jury Instructions—Criminal, §6.07 (Alternative Instruction), 33 F.R.D. 577.

> defendant or that what he told you is the truth beyond all reasonable doubt.' "

In United States v. Agueci, 2 Cir. 1962, 310 F. 2d 817, 833, the court approved this instruction:

> ". . . Judge Herlands' instruction to the jury was more than adequate on this score. He stated, 'The testimony of Palmeri and Rinaldo, who are accomplices by their own admission, must, as a matter of law, be considered by you with close and searching scrutiny and caution.' . . ."

See also, Green v. United States, D.C. Cir. 1965, 348 F. 2d 340; Coleman v. United States, supra; United States v. Rinaldi, supra.

Defendant says Fred Hesse, Jr. should also have been considered an accomplice, and the failure of the court to so instruct the jury was particularly significant because corroboration of Hesse could not come from Hesse, Jr., if the jury found he was also an accomplice. Defendant relies on Arnold v. United States, 10 Cir. 1938, 94 F. 2d 499. There are several answers to this. The testimony of Hesse was corroborated by the testimony of many witnesses other than Hesse, Jr. The uncorroborated testimony of Hesse alone was sufficient to convict. United States v. Gallo, 2 Cir. 1941, 123 F. 2d 229, 230 (rejecting the rule of Arnold, supra). Defendant never requested such an in-

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[8] In Gardner v. United States, 10 Cir. 1960, 283 F. 2d 589 and United States v. Callis, 6 Cir. 1968, 390 F. 2d 606, the court's *refusal* to instruct that certain witnesses were accomplices as a matter of law, when the fact of their participation in the offense charged was disputed, was assigned as error on appeal.

struction related to Hesse, Jr., either in his points for charge or at side bar after the charge was completed. There is nothing in the record to indicate that Hesse, Jr. could have been an accomplice. He may have been guilty of misprison of a felony when, after he acquired knowledge that his father had embezzled $22,000 *not* the subject of this indictment, he assisted his father in paying back the money, without reporting the embezzlement to the authorities.

Defendant for the first time raises other matters which he alleges should have been charged with respect to the corroboration of the testimony of an accomplice. These matters will not now be considered. Rule 30, Fed. R. Crim. P. United States v. Scoblick, 3 Cir. 1955, 225 F. 2d 779, 783; Mims v. United States, 9 Cir. 1958, 254 F. 2d 654; cf. Ortiz v. United States, 9 Cir. 1966, 358 F. 2d 107; United States v. Bozza, 2 Cir. 1966; 365 F. 2d 206.

Cross-Examination of Hesse: The first questions to Hesse on cross-examination brought out that he was married, lived with his wife and was a good family man.[9] Defendant then attempted to bring out that Hesse was with another woman at the time of the accident. The Government objected and was sustained. At the trial,

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[9] "By Mr. Meyers:

Q. Mr. Hesse, you are married?

A. Correct.

Q. Live with your wife?

A. Correct.

Q. You have six children?

A. Yes, sir.

Q. And you consider yourself a good family man?

A. I do."

counsel stated that the door had been opened to impeach Hesse's testimony that he was a good family man and that defendant had threatened his children.[10] The offer was not to prove that Hesse needed money for another woman and thus to discredit his testimony that he embezzled for defendant's use, as argued in defendant's brief. The ruling was proper. Hesse never suggested on direct examination that he was a good family man.[11] The inquiry was far beyond the scope of direct examination, and was purely a collateral matter which defendant interjected into the case. It was not relevant to Hesse's testimony that he feared for his children's safety. It does not follow that if Hesse was involved with another woman that he would be less likely to be coerced into action by threats of violence to his children, as argued by the defendant.

Even if the testimony were relevant, it still would be inadmissible. A trial court has wide discretion in ruling on relevancy and materiality. United States v. Gipson, 7 Cir. 1967, 385 F. 2d 341. It may exclude evidence which is only slightly probative if its introduction would confuse or mislead the jury by focusing its attention on collateral matters, and which would be irrelevant and prejudicial when considered in light of the totality of the evidence. United States v. Bowe, 2 Cir. 1966, 360 F. 2d 1; Yates v. United States, 10 Cir. 1966, 362 F. 2d 578; United

[10] Tr. 116-118.

[11] Cf. Moore v. Chesapeake & O. Ry., 4 Cir. 1950, 184 F. 2d 176, at page 179, where the court said: "It is worthy of note that these were the words of counsel, and not of the witness. They were carefully framed, for no other apparent purpose than to provide an excuse to contradict the engineer's testimony."

States v. Costello, 2 Cir. 1955, 221 F. 2d 668. In Costello, the court, in an opinion written by Judge Learned Hand, said:

> "... It is hornbook law that, although a party may offer evidence rationally relevant to the issue, that does not inevitably make it admissible. It may, just as Judge McGohey thought in this instance, tend rather to mislead than to enlighten the jury. When the prosecution showed the amount of his gross income during the eight years, it did so by proving in detail the purposes for which he spent his money, and thus supplied just the element that was missing from the assessments. It was certainly within the judge's discretion to decide whether to admit them until this omission was supplied; and we are in entire accord with his ruling."

In Carter v. United States, 9 Cir. 1967, 373 F. 2d 911, in an effort to discredit the testimony of a key government witness in a forgery case, counsel attempted to show on cross-examination that the witness, after having been divorced from his first wife, resumed relations with her without remarriage. The court said: "As to the attempted examination of Keynerd on the nature of his relationship with his former wife, the subject was irrelevant to the issues with which the trial was legitimately concerned." In United States v. Kompinski, 2 Cir. 1967, 373 F. 2d 429, the trial court permitted testimony that one defendant, Evanco, a married man, frequently visited the home of a Mrs. Macey. The trial court found, however, that the testimony was probative of the fact that Evanco had access to the Macey phone through which he had received a call from a Chicago phone available to a co-conspirator.

Even then, the court weighed the evidence in the light of its possible prejudicial effect. In approving the ruling, the court of appeals said:

> ". . . Mrs. Judge's testimony had some probative value, showing that Evanco had access to the Macey phone through which he had received a call from a Chicago phone available to Burns. The trial Judge, in his discretion, felt that the probative value of the evidence outweighed the possible prejudice to Evanco which might arise through any inferences as to the nature of his relationship with Mary Macey. The record is clear that no such inferences were suggested to the jury. . . ."

The cases cited by defendant are distinguishable. In McCowan v. United States, 9 Cir. 1967, 376 F. 2d 122, the defendant, as a part of his defense to illegally taking from the mails a package addressed to one Joan Ansel, contended that he needed to see the package because he was conducting an official police investigation of the young girl who had mailed the package. The court said:

> ". . . Tending to undermine this contention was the fact, which the Government sought to disclose on cross-examination, that during the time McCowan said he was investigating this young lady, he was making love to her. Under the circumstances this was proper cross-examination."

It is clear that the probative value of the evidence bearing on an issue, outweighed the prejudicial effect of the testimony. The same is true of McFarland v. United States, D.C. Cir. 1949, 174 F. 2d 538, where the court said:

> "We find further error in the court's refusal to permit cross-examination of Mrs. Conradi as to

whether she and McFarland were living in an illicit relationship in Maryland during the latter part of 1945 and the first few months of 1946. That relationship, if it ever existed apparently had long since terminated when she testified before the grand jury and at the trial, for otherwise it may be supposed that she would not have appeared against the appellant. Consequently, her admission of an illicit affair, had it been obtained, might have tended to show McFarland merely sojourning in Maryland for an extramarital adventure. It might have tended also to show bias and prejudice on the part of Mrs. Comadi. Cross-examination might, therefore, have elicited information affecting Mrs. Comadi's credibility and should have been permitted."

The very next question to Hesse on cross examination was: "Mr. Hesse, did you ever tell Mr. Zarra ". The court immediately called counsel to side bar and requested him to state what he intended to ask. Counsel replied: "I will ask him: Did he ever tell Zarra there was an elderly woman whose husband had died and that he was in charge of the fund or money which had a depository in the Hershey National Bank and she wasn't satisfied with the rate of interest she was getting?—in accordance with my opening." The court ruled that he could ask this question. Because of certain statements made at this side bar conference, the court directed counsel for both parties when asking this type of question to come to side bar first and state the question to the court.[12] If counsel had no

[12] "By the Court:

I will permit that.

intention of introducing competent evidence to establish the fact assumed or supplied by the question, the effect

You understand what I am getting at? I don't want this type of thing to take place in this lawsuit. For instance, you ask the question 'Did so and so ever tell you something,' and the man denies it. There is a statement you don't intend to prove the affirmative of. You see what I mean?-

By Mr. Meyers:

I don't know what I intend to prove.

By the Court:

Suppose he denies this.

By Mr. Meyers:

If he does deny it then it is a question for the jury.

By the Court:

Are you prepared to prove if he denies this that he said it?

By Mr. Meyers:

Am I prepared to prove if he denies this that he said it? I hope to prove it.

By the Court:

Would you state on the record you are going to have testimony to prove it?

By Mr. Meyers:

My client has told me the story. I think on the basis of that that I should be allowed to cross-examine this man.

By the Court:

I am going to suggest this then. Every time from here on that you want to ask a question of that type of this or that type, 'Did you tell so and so something?', all I ask is that you come to sidebar first and tell me what your question is going to be.

* * * * * * * * * *

By the Court:

I think I have made myself clear. Cross-examination is not being limited by this. All I am saying to you—and this is prompted by you a little bit. You attempted to get into this

would be to bring to the jury's attention facts supplied only by the unsworn assertions of counsel. 3 Wigmore, Evidence, §780; 6 Ibid., §1808; cf. Pruett v. State, 1948, 33 Ala. App. 491, 35 So. 2d 119; State v. Singleton, 1947, 66 Ariz. 49, 183 Pac. 2d 920; Seligson v. Young, 1959, 189 Pa. Super. 510; DiBono v. Phila. Transp. Co., 1947, 356 Pa. 204. Counsel was not precluded from asking the questions; he was merely instructed to approach the bench so the court could rule in advance. In his brief, counsel argues that this limited the cross-examination, and that compliance with the instruction would make him appear ludicrous in front of the jury. Cross-examination was not

record you asked this witness: 'Are you a good family man?' You attempted to show what you said at sidebar he was out with another woman. I think it is wrong and I have so ruled. You just started to say to this witness on the stand, 'Did you ever tell Mr. Zarfa ' All I am asking you to do in that type of question is that you first come to sidebar so that I can hear what you intend to ask. I am only attempting to keep this record straight. I am going to let you ask the one you said you would ask about an elderly widow.

By Mr. Meyers:

"This man has portrayed himself as being pious, pompous and a good family man. He has given that impression.

By the Court:

If he has, you brought that out.

"You apparently won't listen to me. I am only asking you to come to sidebar. There may be some statement that can't be brought out. I don't say you are going to do it. Under your theory you may want to ask certain things that I don't think you should. I am trying to keep this straight. That is all I am trying to do. I will put the same restriction on Mr. O'Malley. If he wants to ask any witness whether he has told something to somebody else, I want him to come to sidebar unless he will state upon denial by that witness that he is prepared to prove that."

limited. Counsel conducted an extensive cross-examination of Hesse and cross-examined the other witnesses to the extent he thought necessary. Only twice after the side bar conference did he inquire of the court whether he was permitted to ask a certain question. The court did not know whether the defendant would take the stand, and since counsel was of the opinion that he had an absolute right to cross-examine Hesse on any statement attributed to Hesse by defendant, the court acted properly in attempting to contain the trial within proper bounds. Compliance by counsel was a simple matter. All he had to do was to collect all statements which defendant said Hesse made, and in one side bar conference inform the court.

The motion of defendant to set aside the verdict and enter judgment of acquittal, and in the alternative the motion for a new trial will be denied.

(s) Michael H. Sheridan
Chief Judge, Middle District of Pennsylvania

Dated: March 31, 1969.

ORDER AMENDING OPINION

The opinion dated March 31, 1969, in the above action is hereby amended as follows:

Page 3, paragraph 1, line 6 from top, delete "calls"; substitute "requests".

Page 9, line 3 from top, United States v. Bozza, *supra,* should read United States v. Bozza, *infra.*

(s) Michael H. Sheridan
Chief Judge, Middle District of Pennsylvania

Dated: June 24, 1969.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 18001

United States of America,

v.

Ralph Louis Zarra,

Appellant

Appeal from the United States District Court for the Middle District of Pennsylvania

---

Argued April 6, 1970

Before Seitz, Aldisert, *Circuit Judges*, and Latchum, *District Judge*

OPINION OF THE COURT
(Filed April 29, 1970)

Per Curiam:

A jury found appellant guilty of a one-count indictment charging him with aiding and abetting Frederick Delaney-Hesse, an officer of the Hershey National Bank, in embezzling funds of the bank in violation of 18 U.S.C. §§656 and 2. The judgment of conviction imposed a sen-

tence of five years with parole at any time under the provisions of 18 U.S.C. §4208(b)(2). The appellant urges a reversal of his conviction on the grounds that the indictment was fatally defective and that the district court committed several trial errors.

All of the issues presented on this appeal were fully considered by the district court on appellant's post-trial motions and were resolved against the appellant. United States v. Zarra, 298 F. Supp. 1074 (M.D. Pa. 1969). No useful purpose would be served to add to Chief Judge Sheridan's opinion other than to say that our examination of the record satisfies us that the trial rulings and the charge of the district court did not amount to prejudicial error to the appellant and that the appeal is without merit.

The judgment of conviction will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Supreme Court, U.S.
FILED
AUG 17 1970
E. ROBERT SEAVER, CLERK

No. 329

In the Supreme Court of the United States

OCTOBER TERM, 1970

RALPH LOUIS ZARRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
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No. 329

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of aiding and abetting one Hesse, an officer of the Hershey National Bank, in embezzling $101,000 of the bank's funds, in violation of 18 U.S.C. 656 and 2. He was sentenced to five years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed *per curiam* (Pet. App. 57-58), relying on the comprehensive treatment of the issues by the district court in an opinion denying post-verdict motions (Pet. App. 30-55).

In the present petition, petitioner re-asserts two of the contentions previously rejected. First, he contends that the indictment was insufficient because it did not allege that petitioner knowingly aided and abetted Hesse in committing the embezzlement offense. A charge of aiding and abetting, however, itself carries "an implication of purposive attitude towards [the criminal venture]." *United States* v. *Peoni*, 100 F. 2d 401, 402 (C.A. 2), cited with approval in *Nye & Nissen* v. *United States*, 336 U.S. 613, 619. Here the trial court's instructions meticulously made clear that in order to convict the jury had to find that petitioner acted with specific intent to assist Hesse in committing the crime (Pet. App. 21-22).

Petitioner also contends that the trial judge committed prejudicial error in stating in the instructions that (Pet. 23): "The witness Fred Hesse is an accomplice of the accused in this case. That is, he would be if you find he embezzled the money." Petitioner argues that the instruction implied that petitioner's guilt had been determined by the court. As the district court's opinion points out, however (Pet. App. 11-12), any such implication was at the invitation of petitioner, who requested that an instruction be given characterizing Hesse as an "accomplice". Moreover, as further noted by the district court (Pet. App. 40), the instruction was in that part of the court's charge explaining "the manner in which [the jury] should consider the testimony of an accomplice. To argue that in effect the court told the jury that defendant's guilt was established is to take this instruction completely out of context."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER PAULEY,
Attorneys.

AUGUST 1970.

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